



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

### Examining the Guidance Function of Agency Preambles

#### ACUS Project Outline

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#### **Overview**

When an agency issues a rule, it faces a choice: whether to include guidance about the interpretation of that rule in the “concise general statement of basis and purpose” set forth in the agency preamble or to issue guidance later. This project aims to identify best practices for agencies in deciding whether to include guidance (and what kind of guidance) in the preambles to rules they issue.

I view the project as having five basic elements. These elements provide a rough overview of my approach as well as an organizational structure for the eventual report:

(1) *Introduction*. The report will begin with a definition of the inquiry, a summary of the debate over guidance and deference to guidance, and a summary of congressional and agency efforts to encourage clarity and comprehensibility in regulations.

(2) *A Survey of Agency Practice*. The second phase is to gather examples of the ways in which agencies provide guidance about the interpretation of their regulations in regulatory preambles, with the goal of developing a categorization of the types of guidance agencies provide in preambles.

(3) *Agency Best Practices*. The third phase is to identify the considerations that inform agency choices over the type of guidance to include in their preambles, with the goal of isolating a set of best practices for agencies.

(4) *Legal and Institutional Constraints*. The fourth phase is to assess the legal and institutional constraints that bear on providing guidance in preambles.

(5) *Recommendations*. The final phase is to develop a set of recommendations based on agency best practices.

Below I discuss each of these elements of the project, addressing their goals and methods.

## **I. Introduction**

*Goals:* The introduction will motivate and situate the inquiry into the guidance functions of agency preambles within the larger debates over guidance and long-standing interest in enhancing the clarity and ease of use of notice-and-comment regulations.

*Methods:* The introduction can be produced primarily with legal research. It will include the following:

1. A discussion of the law governing guidance, including a brief overview of the permissibility of guidance under the APA, the standards of judicial review applicable to guidance (e.g., *Auer*), and the one-bite/*Alaska Hunters* rule (*see Mortgage Bankers Ass’n v. Harris*, 720 F.3d 966 (D.C. Cir. 2013)), in the D.C. Circuit.
2. An overview of any OMB, ACUS (and possibly GAO and CRS) recommendations regarding guidance, including OMB’s Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (2007), and Agency Policy Statements, ACUS Recommendation 92-2, § II(B) (adopted June 18, 1992).
3. A discussion of the broader interest in the clarity and comprehensibility of regulations and guidance to the public, as evidenced by (a) the Small Business Regulatory Enforcement Fairness Act, requiring publication of Compliance Guides for small entities, 5 U.S.C. § 601 notes, (b) the Plain Writing Act of 2010 and OMB implementing guidance on the use of plain language, and (c) Executive Order Nos. 13563, 12866, and 12988 which touch on plain language.
4. A discussion of the functions of the “statement of basis and purpose” that agencies must produce in notice-and-comment rulemaking.

## **II. A Survey of Agency Practice**

*Goal:* The goal is to survey agency practices in providing guidance as to the meaning or interpretation of their regulations in preambles and to develop a categorization of these practices. The aim is not to describe how frequently agencies rely on any particular practice, but instead to classify the primary types of guidance in preambles. This might be usefully presented in the form of an extensive table. The table would be introduced by a narrative description and followed by a detailed discussion of the examples.

Here are a few, very preliminary categories in a mock-up of a table; these categories will be expanded, revised, and refined.

Mock-Up of Table 1: A Survey of Guidance in Preambles

Dimension	Agency Choice		Examples
Articulation of Purpose(s) of the Regulation	Independent (agency articulates the regulation's purpose(s))	Statute Mirroring (agency simply states the regulation implements the statute)	Independent:
			Mirrored:
Designated General Guidance	Included (such as in Interpretations or Official Interpretations sections, referencing the purpose of the regulation or statute)	Excluded	Official Interpretation:
Designated Section-by-Section Guidance	Included (say, as part of Official Interpretation, or FAQs)	Excluded	Section-by-Section:
Interpretations Offered in Response to Comments But Not Designated Interpretive Guidance	Included (say in Section-by-Section Commentary)	Excluded	Comment Section:
Other Dimensions . . . . .			

The information might instead or in addition be presented in subcategory tables, such as the following Mock-Up of Table 2.

Mock-Up of Table 2: Articulation of Purpose(s) of the Regulation

Dimension 1 : Articulation of Purpose(s) of the Regulation	
Agency Choice	
Independent (agency articulates the regulation's purpose(s))	Statute Mirroring (agency simply states the regulation implements the statute)
Examples	
Independent:	Mirrored:

*Method:* I plan to pursue a two-track approach to finding examples of guidance in preambles. First, I am conducting searches in the Federal Register of the preambles to Final Rules. Given the volume of rulemaking, I may end up restricting my set of searches to those in a more limited period of years (say, the last 5 or 10 years) and/or a limited number of agencies. Second, I plan to establish email contact with some agency lawyers who draft preambles to ask them for assistance in locating examples of interpretive guidance in preambles from their agencies. This one-to-one communication will help ensure that I am not missing important categories of agency practice.

### **III. Agency Best Practices**

*Goal:* The goal is to identify agency best practices for including guidance in their rulemaking preambles. Rulemakings are extremely varied in terms of the audience of the rules, the level of uncertainty about how compliance will work, the costs and benefits of compliance, the pace of technological or other change in the area regulated, and so on. Given the diversity of rules and regulated conduct, it may not make sense to try to identify uniform, one-size-fits-all best practices for all rulemakings. What is best practice will depend in part on the particulars. But it will still be possible to identify some outlier practices that are clearly less favorable. I will also seek to identify a set of factors which presumptively suggest that particular types of guidance should be included in a preamble. One difficult question is when guidance (such as example applications) should be included in the preamble as opposed to adopted as part of the notice-and-comment rule itself.

*Methods:* This part is the most challenging in terms of approach. I believe it would be very helpful to talk to some agency lawyers who have been deeply involved in rulemaking. Attorney Advisor Funmi Olorunnipa and I have tentatively set early January 2014 as a time for a roundtable conversation. At the roundtable, I would present the participants with initial categorizations and assessments with the hope that they could help to confirm the use of these considerations and possibly to identify others. I also plan to reach out to NGOs with an interest in rulemaking, such as the Center for Effective Government (formerly OMB Watch) and the Chamber of Commerce, among others. I also will do research on the optimal specificity of rules, but my intuition is that factors grounded in agency practice are going to be more useful and tractable.

### **IV. Legal and Institutional Constraints**

*Goal:* The goal is to identify legal and institutional constraints on providing more or less specific guidance (or even types of guidance) in preambles. In terms of legal constraints, this part will discuss the distinction between legislative and non-legislative rules, the “one-bite/*Alaska Hunters*” rule, and other doctrines interpreting § 553 of the APA that might inhibit the agency’s capacity to offer guidance in its preambles. In terms of institutional considerations,

this part will address factors which influence the agency’s choice to provide more or less explicit interpretive guidance in preambles, including agency resources, uncertainty about the impact of the rules, agency policy with regard to preserving flexibility for future interpretation of their rules, OMB/OIRA policy or direction, expected efficiency benefits with regard to enforcement or compliance, and expected cost reductions for the regulated in determining the meaning of regulations. This part will also consider the extent to which a focus on articulating the purposes of the rule or providing more extensive guidance could streamline preambles or add additional regulatory burdens to drafters.

*Method:* This part primarily involves legal and institutional research. With the regard to the legal constraints, one concern is that *Alaska Hunters* may play an overwhelming role in shaping agencies’ guidance practices, including their practices with regard to preambles. As recently clarified by the D.C. Circuit in *Mortgage Bankers Ass’n v. Harris*, 720 F.3d 966 (D.C. Cir. 2013), for an agency to make a “significant revision” to a previously issued “definitive interpretation” of a rule, the agency must undergo notice-and-comment regardless of whether the regulated party has relied on the interpretation. *See id.* at 969. This rule imposes a high cost on agencies—a renewed notice-and-comment proceeding—to change definitive interpretations of their rules. As a result, it discourages agencies from providing definitive guidance in any form, including official interpretations in preambles.

Because the *Alaska Hunters* rule is not adopted in every circuit and is currently the subject of a cert. petition challenging the recent *Mortgage Bankers* decision, I propose to assess it in the alternative: first, assuming that the *Alaska Hunters* rule remains good law, and second, assuming that the D.C. Circuit or Supreme Court abandons or overrules it. While this approach seems prudent so the report has less chance of being rendered moot by legal developments, it does mean that some part of the report that may have a more speculative air in that it will address the agency’s choices in the event that *Alaska Hunters* is overruled.

## **V. Recommendations**

The final part will develop a basis for several recommendations for best practices for agencies. These recommendations will be informed by the assessment of best practices shared by agency officials and knowledgeable stakeholders outside of government as well as the legal and institutional constraints on agencies. These might range, for instance, from emphasizing the importance of the agency providing an independent articulation of the purpose of the regulation to when section-by-section guidance is strongly advised.